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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE EDWARD JACKSON,

Defendant and Appellant.

D052466

(Super. Ct. No. SCD205438)

APPEAL from a judgment of the Superior Court of San Diego County, Frederick Maguire, Judge. Affirmed.

In July 2007 a jury convicted Bruce Edward Jackson of possessing cocaine base as a lesser-included offense of furnishing cocaine base (Health & Saf. Code, § 11350, subd. (a); count 1) and possession of cocaine base for sale (Health & Saf. Code, § 11351.5; count 2). Jackson thereafter admitted that he had two previous drug convictions and had served two prior prison terms within the meaning of Penal Code¹ sections 667.5, subdivision (b), and 668.

¹ All further statutory references are to the Penal Code unless otherwise specified.

The court sentenced Jackson to a state prison term of six years, consisting of a three-year lower term on count 2, plus three years for one of the prior drug convictions. The court imposed and stayed sentences on the other prior drug conviction and the two prior prison term enhancements and imposed a concurrent two-year term on count 1. Pursuant to Welfare and Institutions Code section 3051, the parties stipulated that Jackson was addicted to cocaine, and the court ordered criminal proceedings suspended and referred him to the California Rehabilitation Center at Norco.

On appeal, Jackson asserts (1) there is insufficient evidence to support his count 2 conviction for possession of cocaine for sale; and (2) the court should have sua sponte given a unanimity instruction as to that count because there were two different acts which the jury could have relied upon to convict him of that crime. We affirm.

FACTUAL BACKGROUND

A. People's Case

San Diego Police Officer Jesse Zaldivar was assigned to the narcotic street team, which was investigating sales of narcotics in downtown San Diego. On March 21, 2007, at approximately 9:40 p.m., Officer Zaldivar was working undercover as a buyer. As Officer Zaldivar was walking on the 400 block of C Street, Jackson was walking towards him. When Jackson got close, Zaldivar asked him "if anybody was serving." "Serving" is street slang for selling drugs. Jackson asked Officer Zaldivar what he was looking for, and Officer Zaldivar responded, "A 20," which meant he wanted to buy \$20 worth of cocaine base. Jackson told Officer Zaldivar to follow him, which he did. As they walked, Jackson asked Officer Zaldivar if he was a police officer. Officer Zaldivar

replied that he was not. Jackson asked to see his hands and fingers and told him he did not look like a smoker.²

Jackson asked Officer Zaldivar if he could use his cell phone. Officer Zaldivar complied and heard Jackson say over the phone he was near the Bank of America at Fourth and B Street. Jackson then gave the phone back and told him to erase the number he had just called. Officer Zaldivar pretended to do so. Jackson told Officer Zaldivar to give him the money to pay the person they were going to meet to purchase the cocaine base from. Officer Zaldivar gave him two \$10 bills, copies of which he had made earlier. Jackson asked for an additional \$2, but Officer Zaldivar said he did not have two \$1 bills. Officer Zaldivar told him, however, that if the cocaine base was of good quality and size, he had another \$20 for a second purchase and Jackson could take the \$2 from that. Jackson assured him the cocaine base they were purchasing was of good quality. When they reached a bus stop bench, they sat and waited for the seller.

When Jackson spotted the seller, he told Officer Zaldivar to wait while he met the seller about a block away. They talked for a bit and then walked away out of sight. Jackson returned a short time later and said the person he met did not have any drugs and they would have to wait. However, after they sat for approximately 30 seconds, Jackson said, "Here," and placed beside him on the bus bench what appeared to be cocaine base. Officer Zaldivar picked it up. Jackson asked if he could have a piece of the cocaine base,

² Officer Zaldivar explained to the jury that in his experience, a person who smokes cocaine base will have callused and rough fingers from holding a hot pipe and sometimes will have burn marks and scarring on his or her finger tips.

which Officer Zaldivar testified was customary for the middle man in this type of transaction. Officer Zaldivar said he would give him a piece but they needed to start walking again because they had been in one place for too long. Zaldivar gave a signal to his team to make the arrest.

They walked down the block and turned west on Ash Street, where members of the team moved in to detain Jackson. Jackson turned and tried to run away. As he ran, Officer Zaldivar saw him raise his hand to his face, near his mouth.

Officer Susan De La Pena arrested Jackson, after a short flight. After he was handcuffed and on the ground, she saw two pieces of cocaine base inches from his mouth, which he appeared to have just spit out.

Officer De La Pena retrieved the cocaine base and turned it over to Officer Maria Delgadillo, who transported the cocaine and Jackson to the police station. Officer Delgadillo searched Jackson and found user paraphernalia, including a cocaine pipe, and pieces of a Brillo pad in his right front jacket pocket. In his testimony, Officer Zaldivar stated that, in his experience, street level sellers are often also users, and users are often also sellers. Officer Delgadillo found several non-working cell phones on Jackson's person. She did not find any weapons or money, including the prerecorded \$10 bills. She testified that in her experience, those who sell illegal drugs do not want to be caught with possibly marked money.

Detective Esmeralda Tagaban was monitoring Officer Zaldivar that night from an unmarked car. She saw Jackson walk on Ash Street to where he met with a Black male, later identified as Eric Wilkins. Detective Tagaban followed Wilkins to the Center City

Apartments at 1450 Fourth Avenue. Police searched Wilkins and his apartment but did not find the prerecorded \$10 bills or any narcotics.

Laboratory tests verified that the piece of cocaine base given to Zaldivar weighed approximately 0.20 grams, and the two smaller pieces Jackson had in his mouth weighed a total of 0.26 grams. Officer Zaldivar opined the pieces of cocaine bases were "usable amounts," based on the size and amount, as well as his training and experience. He stated that even "kibble," which is street slang for little bits of cocaine base that break off a "rock" or are the remnants in the bottom of a bag holding a rock of cocaine, were also "usable" amounts.

B. Defense Case

Jackson rested without presenting witnesses or additional evidence.

DISCUSSION

I. SUFFICIENCY OF EVIDENCE TO SUPPORT COUNT 2 CONVICTION

A. Standard of Review

The critical inquiry on review of the sufficiency of the evidence is whether the record reasonably supports a finding of guilt beyond a reasonable doubt. This inquiry does not require a court to " 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation, italics added.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Thus, " ' "[i]f the circumstances

reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" (*People v. Bean* (1988) 46 Cal.3d 919, 933; *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Applying these principles to the present case, we conclude that substantial evidence supports defendant's conviction for possession of cocaine base for the purpose of sale.

B. *Analysis*

Possession of narcotics for sale requires proof the defendant possessed the contraband with the specific intent to sell it and with knowledge of both its presence and illegal character. (*People v. Parra* (1999) 70 Cal.App.4th 222, 225-226; accord, *People v. Meza* (1995) 38 Cal.App.4th 1741, 1745-1746.) "[The i]ntent to sell may be established by circumstantial evidence." (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.)

Jackson asserts there is no substantial evidence to support his conviction on count 2, arguing that there is insufficient evidence he had an intent to sell. In particular, Jackson points to the fact there was no expert testimony that the cocaine base he possessed was for sale, rather than for personal use. This contention is unavailing.

Courts allow experienced narcotics officers to give an opinion that drugs possessed by a defendant are for sale, based upon the quantity, packaging, and other factors. (*People v. Harris, supra*, 83 Cal.App.4th at pp. 374-375.) However, no case has held that such an expert opinion is *required* to prove intent. Here, there was strong direct

and circumstantial evidence that Jackson intended to sell the cocaine base to Officer Zaldivar. The strongest evidence is the fact that Jackson did facilitate a sale of cocaine base to him. He took \$20 from Officer Zaldivar, conferred with a second individual, and then delivered a rock of cocaine to him. He also was in possession of more cocaine base when he was arrested. The quantity in his possession, although small, is consistent with possession with intent to sell. Officer Zaldivar originally requested \$20 worth, but said he would purchase another \$20 if the quality and size were good. Jackson delivered one rock to Zaldivar and when arrested had in his possession two smaller rocks that approximated the first one in total size.

Jackson points out that he was found not guilty on count 1, sale of cocaine base. The jury only found him guilty of the lesser-included offense of simple possession. However, this could have been because the jury perceived him as only a middle man in that sale. He also did not have the two prerecorded \$10 bills in his possession when arrested, so the jury could have believed the transaction was never completed.

Further, although Jackson was in possession of items indicating he was a user, this fact is not inconsistent with an intent to sell. Officer Zaldivar testified that in his experience, street level dealers are often also users, and users are often also dealers. Substantial evidence supports Jackson's conviction for possession with intent to sell.

II. *UNANIMITY INSTRUCTION*

A. *Background*

In closing argument the People asserted the actions that supported count 1 were Officer Zaldivar giving Jackson money and Jackson giving him a rock of cocaine in

return. On the other hand, on count 2, possession with intent to sell, the People argued that it was a continuous course of conduct and that Jackson could be found liable for possession of the rock he delivered to Officer Zaldivar or the two rocks he spit out or both.

Jackson argued as to count 1 that they should not believe Officer Zaldivar's testimony he gave money to Jackson as no money was ever found. Defense counsel also argued there was no money in Jackson's possession, no packaging material, and no working cell phones to show he was selling cocaine base. As to count 2, counsel argued he only possessed the cocaine for personal use, as demonstrated by the fact he had a cocaine pipe.

B. *Analysis*

"Defendants in criminal cases have a constitutional right to a unanimous jury verdict." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114.) When a defendant is charged with a single criminal act, but the evidence reveals more than one instance of the charged crime, either the prosecution must select the particular act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) If the prosecution does not make a selection, the court has a sua sponte duty to give an instruction along the lines of Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 3500, stating that the jury must unanimously agree upon the act or acts constituting the crime. (*People v. Russo, supra*, at p. 1132.) CALCRIM No. 3500 reads in pertinent part: "The People have

presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

The purpose of the unanimity instruction is to prevent a verdict that results from some jurors believing the defendant committed one act and others believing the defendant committed a different act, without agreement on what conduct constituted the offense. (*People v. Washington* (1990) 220 Cal.App.3d 912, 915-916.)

However, the court need not give a unanimity instruction "when the acts are so closely connected in time as to form part of one transaction." (*People v. Crandell* (1988) 46 Cal.3d 833, 875, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365; *People v. Maury* (2003) 30 Cal.4th 342, 423 [acts were so closely connected they formed part of one and the same transaction].)

Jackson asserts the court should have given a unanimity instruction in this case because, since the weight of the one rock delivered to Officer Zaldivar and the two smaller ones in his possession were roughly the same, "it cannot readily be discerned which of the two amounts was relied upon by the jury in arriving at its verdict on Count 2." We reject this contention.

As the People argued in closing argument, Jackson could have been convicted of possession with intent to sell for possession of any or all of the three rocks of cocaine because it was a continuous course of conduct. Until he gave Officer Zaldivar the first rock, he possessed all three, and the jury could conclude he intended to sell those rocks.

Officer Zaldivar testified he gave Jackson \$20 and told Jackson if the quality and size were good, he would buy a second \$20 worth. Jackson returned with one rock that was for the initial \$20, and two other rocks that totaled in weight approximately the same amount. Because he delivered the first rock to Officer Zaldivar, the jury could infer he stood ready to sell the other two. Accordingly, as to count 2, the continuous course of conduct exception applies, and the court need not have given the jury a unanimity instruction.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.